

1 UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF NORTH CAROLINA
3 (Bryson City Division)
4

5 -----X
6 UNITED STATES OF AMERICA, :
7 Plaintiff :
8 :
9 vs :Criminal Action:2:12-CR-33(5)
10 :
11 KRISTY FRANKS, :
12 Defendant. :
13 -----X

11 Wednesday, August 21, 2013
12 Bryson City, North Carolina

13 The above-entitled action came on for a Sentencing
14 Hearing Proceeding before the HONORABLE DENNIS L. HOWELL,
15 United States Magistrate Judge, in Courtroom 50,
16 commencing at 2:02 p.m.

16 **APPEARANCES:**

17 On behalf of the Government:
18 DON D. GAST, Esquire
19 Office of the United States Attorney
20 100 Otis Street
21 Asheville, North Carolina 28801

22 On behalf of the Defendant:
23 FRANK A. ABRAMS, Esquire
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24 Tracy Rae Dunlap, RMR, CRR 828.771.7217
25 Official Court Reporter

I N D E X

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1 P R O C E E D I N G S

2 THE COURT: Good afternoon, everyone.

3 MR. GAST: Good afternoon, Your Honor.

4 MR. ABRAMS: Good afternoon, Your Honor.

5 THE COURT: The first matter this afternoon is the
6 case of United States versus Kristy Franks which is
7 before the Court for the sentencing of the Defendant
8 pursuant to her plea of guilty on the charge of
9 conspiracy to possess with intent to distribute cocaine
10 base, in violation of 21 U.S.C., Sections 841 and 846.

11 Mr. Abrams, good afternoon.

12 MR. ABRAMS: Good afternoon, Your Honor.

13 THE COURT: Is the Defendant prepared to proceed?

14 MR. ABRAMS: The Defendant is prepared to proceed.

15 THE COURT: Mr. Gast, good afternoon to you. Is
16 the Government prepared to proceed?

17 MR. GAST: Good afternoon, Your Honor. Yes, we
18 are ready to proceed.

19 THE COURT: In preparation for this hearing I have
20 reviewed the Defendant's objections to the presentence
21 report. I have reviewed the Defendant's sentencing
22 memorandum that includes a motion for downward departure
23 and/or variance that has several letters that are
24 attached. I have reviewed the Government's motion for a
25 downward departure under 5(k)(1.1). And I have reviewed

1 the Government's sentencing memorandum. I also reviewed
2 a document that was filed yesterday on behalf of the
3 Defendant, but I believe there was some mix-up there as
4 to what was to have been attached.

5 Mr. Abrams, are there additional items that you
6 were intending to file that you were wanting to hand up
7 at this time?

8 MR. ABRAMS: There is one letter, Your Honor, that
9 I have shown to Mr. Gast and it's by an Edna J. Hartley.
10 If I may?

11 THE COURT: Is it the same as the one that was
12 attached?

13 MR. ABRAMS: It is the same.

14 THE COURT: So the only error, then, was there was
15 an additional document that was inadvertently attached?

16 MR. ABRAMS: Exactly.

17 THE COURT: Okay. Well I've read the one from
18 Ms. Hartley. I just wanted to check and make sure there
19 wasn't something in addition to that one that you wanted
20 to file.

21 MR. ABRAMS: No. That was it, Your Honor.

22 THE COURT: Okay. Any other items that were --
23 that have been filed or were intended to be filed in
24 preparation for this hearing? Any for the Defendant?

25 MR. ABRAMS: Nothing for the Defendant.

1 THE COURT: Any others for the Government?

2 MR. GAST: No, Your Honor.

3 THE COURT: Very good. Ms. Franks, I need for you
4 to stand, please. Do you recall appearing before the
5 magistrate judge on or about the 22nd of January of this
6 year for the purpose of entering a plea of guilty in this
7 case?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you remember being sworn in or
10 placed under oath at that time?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you remember answering the
13 questions of the magistrate judge?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Is it correct that at that time you
16 signed a Plea Inquiry Form indicating that the answers
17 that you gave were true and correct at the time they were
18 given?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Were all the answers that you gave to
21 the magistrate judge, in fact, true and correct when you
22 answered his questions?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: If I asked you all the same questions
25 here today would your answers be the same?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Mr. Abrams, were you in attendance at
3 the Rule 11 hearing for your client?

4 MR. ABRAMS: Yes, I was, Your Honor.

5 THE COURT: Are you satisfied that she has fully
6 understood the questions that were asked of her by the
7 magistrate judge at that hearing?

8 MR. ABRAMS: I am.

9 THE COURT: Are you satisfied that she has fully
10 understood the questions that I've asked her here today?

11 MR. ABRAMS: I am.

12 THE COURT: Ms. Franks, did you answer those
13 questions the way that you did and are you pleading
14 guilty because you did in fact commit the crime with
15 which you are charged?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Is your plea of guilty the result of
18 any threat or force or promise, other than promises that
19 may be in your plea agreement?

20 THE DEFENDANT: No, sir.

21 THE COURT: Are you pleading guilty voluntarily?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: In this case you're pleading guilty
24 pursuant to a plea agreement. In that plea agreement you
25 have agreed, and the Government has agreed, to certain

1 facts and certain factors for sentencing. But under the
2 law I am not required to accept those facts or factors
3 just because both sides have agreed. And if I decline to
4 accept any of those facts or factors in my sentencing
5 decision, that will not give you the right to withdraw
6 your plea. Do you understand that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Is it still your plea to plead guilty
9 in this matter?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Based upon the representations made to
12 the Court and the answers given by the defendant at the
13 Rule 11 hearing before the magistrate judge, the Court
14 finds, concludes and confirms that the Defendant's plea
15 is knowingly and voluntarily made and that the Defendant
16 understands the charge and the potential penalties and
17 consequences of her plea.

18 Mr. Abrams, does the Defendant stipulate that
19 there is a factual basis to support her plea of guilty
20 entered in this case and, further, that the Court may
21 accept the evidence as set forth in the presentence
22 report as establishing such factual basis?

23 MR. ABRAMS: The Defendant so stipulates, absent
24 the objection we filed as to one particular factual
25 scenario having to do --

1 THE COURT: Well --

2 MR. ABRAMS: Yeah.

3 THE COURT: There was an objection that you lodged
4 to a particular fact that is in the offense conduct, but
5 that particular fact is not relevant to whether or not
6 there is a factual basis.

7 MR. ABRAMS: Correct. We do stipulate to a
8 factual basis.

9 THE COURT: Okay. And you stipulate that there is
10 sufficient facts set out in the presentence report to
11 which there is no objection to form a factual basis for
12 the charge and the plea in this matter; is that correct?

13 MR. ABRAMS: Yes. We so stipulate.

14 THE COURT: Okay. Mr. Gast, does the Government
15 so stipulate?

16 MR. GAST: Yes, Your Honor.

17 THE COURT: Based on the stipulation of the
18 parties and the evidence as set forth in the presentence
19 report, which report was previously reviewed by the
20 Court, and based upon the Defendant's admission of guilt,
21 the Court finds, concludes and confirms that there is a
22 factual basis for the Defendant's plea. Accordingly, the
23 Court confirms the magistrate judge's acceptance of the
24 Defendant's guilty plea and this court accepts the
25 Defendant's plea of guilty, finds the Defendant is

1 guilty, and enters thereon a verdict and judgment of
2 guilty.

3 Ms. Franks, there is a document that has been
4 prepared; I'm holding up a copy of it here. It has a
5 caption on the upper left-hand side that reads, "United
6 States of America versus Kristy Franks." And over here
7 on the upper right-hand side it has a title that reads,
8 "Presentence Investigation Report." I see that your
9 attorney is showing you a copy there at your table. Have
10 you seen this document before today?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Have you had an opportunity to review
13 this document with your attorney?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Do you understand the contents of that
16 document?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Mr. Abrams, have you had an
19 opportunity to review the presentence report with
20 Ms. Franks?

21 MR. ABRAMS: I have, Your Honor.

22 THE COURT: Are you satisfied that Ms. Franks
23 understands the contents of the presentence report?

24 MR. ABRAMS: I am, Your Honor.

25 THE COURT: Thank you. Ms. Franks, you may take

1 your seat.

2 With regard to the presentence report there is one
3 outstanding objection that has been lodged on behalf of
4 the Defendant pertaining to a particular factual
5 statement that is set out in the presentence report that
6 does not affect the factual basis or any of the criminal
7 history or offense level calculations in this case.

8 Mr. Abrams, do you want to be heard further on
9 that?

10 MR. ABRAMS: Just very quickly, Your Honor. Our
11 position is she has four kids. And she has always put
12 forth that she is a good mother and would never have used
13 drugs in front of her children. This might be a factor
14 that the Court might consider in sentencing her because,
15 of course, use of drugs in front of kids is something
16 that the Court might consider as a negative in regards
17 to, you know, leniency. And we just want to put forth --
18 she wants to put forth to this court that if someone said
19 that, or if another person said that, that that in her
20 words is not true, Your Honor.

21 She is accepting responsibility for what she is
22 guilty of and, basically, that's it Your Honor. She just
23 wants the Court to know that she would never have done
24 drugs in front of her kids or with her kids around.

25 THE COURT: Well, I'm a little bit confused about

1 your objection, though, because your objection says the
2 Defendant denies ever using crack cocaine in the presence
3 of the children. But even paragraph 18 refers to the
4 defendant having gone into another room from where the
5 children were to have used the crack cocaine. So I'm not
6 sure that the nature of your objection addresses even
7 what's said in paragraph 18. Do you want to address that
8 any further?

9 MR. ABRAMS: Only, Your Honor, that what is
10 written may well be true, you know, that she --

11 THE COURT: I see that the Defendant is shaking
12 her head. She says it's not true.

13 MR. ABRAMS: If I may have just one moment, Your
14 Honor?

15 THE COURT: You may.

16 (Discussion held off the record between the
17 Defendant and Mr. Abrams.)

18 (Back in open court.)

19 MR. ABRAMS: Your Honor, her position is -- and
20 I'm representing my client to the best of my ability.
21 Her position is that that is not true, that she did not
22 use crack cocaine with her children present or go into
23 another room -- or go into another room.

24 THE DEFENDANT: I can tell you why --

25 (Discussion held off the record between the

1 Defendant and Mr. Abrams.)

2 (Back in open court.)

3 MR. ABRAMS: She said that something else happened
4 that day, but that is not an accurate description of what
5 happened.

6 THE COURT: Okay. Thank you.

7 Mr. Gast, does the Government have anything that
8 you want to say or offer in response?

9 MR. GAST: Not especially, Your Honor. I have no
10 objection to the Court considering it as a proffer of her
11 denial. We just ask the Court to also consider that this
12 is what the Confidential Source reported and that there
13 was a lot of corroboration with everything else that the
14 Confidential Source reported, and then the Court has to
15 make that determination.

16 THE COURT: Okay. With regard to the objection.
17 As noted earlier, the particular language objected to
18 really does not have any effect on the calculation of the
19 offense level, the calculation of the criminal history
20 category or any other determination to be made as a part
21 of this hearing. Obviously, the Defendant is raising
22 this objection on the grounds that the information set
23 out in paragraph 18 may influence the Court based on the
24 Section 3553(a) factors to impose a harsher sentence.

25 What I will do is I'm going to overrule the

1 objection and accept the presentence report as written.
2 However, I will note that the Defendant, who has accepted
3 responsibility and has accepted the truth of all the
4 other statements within the presentence report,
5 obviously, is quite strong in her disagreement with that
6 particular statement and I will take that into account
7 with regard to my decision in this matter. So the
8 objection is overruled, and the presentence report is
9 accepted as to that matter as written.

10 Are there any other matters concerning the
11 presentence report that need to be addressed,
12 Mr. Abrams?

13 MR. ABRAMS: Nothing further, Your Honor.

14 THE COURT: And Mr. Gast, anything for the
15 Government?

16 MR. GAST: No, sir, Your Honor.

17 THE COURT: Okay. Therefore, the presentence
18 report as a whole is accepted as written and, based
19 thereon, the Court will find that the total offense level
20 in this case is 23 and the criminal history category in
21 this case is II. Based on that total offense level and
22 criminal history category, the Court determines as a
23 matter of law that the guideline range would be 51 to 63
24 months. But in light of the statutory mandatory minimum
25 and Section 5(g)(1.1) that makes the guideline range in

1 this case 60 to 63 months.

2 Mr. Abrams, did I calculate that correctly?

3 MR. ABRAMS: Your Honor, I apologize.

4 THE COURT: Do you need some water?

5 MR. ABRAMS: I might need a little.

6 THE COURT: There's some right there.

7 MR. ABRAMS: Thank you, Your Honor. I've been
8 fighting this for the last --

9 THE COURT: I understand.

10 MR. ABRAMS: -- few days.

11 Thank you. I believe Your Honor said when he
12 adjusted the guidelines it's a 23, Level II, which is 51
13 to 63 months. Correct?

14 THE COURT: You were coughing through part of
15 that. Let me repeat it to make sure you understood what
16 I said. I've found that the total offense level is 23
17 and the criminal history category is II. Based on that
18 total offense level and criminal history category, the
19 guideline range would be 51 to 63 months. But in light
20 of the statutory mandatory minimum and Section 5(g)(1.1),
21 that makes the guideline range 60 to 63 months.

22 MR. ABRAMS: That's correct, Your Honor.

23 THE COURT: Mr. Gast, do you agree?

24 MR. GAST: Yes, sir, Your Honor.

25 THE COURT: The next thing I want to turn to then

1 is the Government's motion for downward departure.

2 Mr. Gast, I have read the written motion that you have
3 submitted. Is there anything in addition to what you
4 have presented in the written motion that you want to be
5 heard on?

6 MR. GAST: No, sir, Your Honor. Thank you.

7 THE COURT: And with that, I have reviewed the
8 motion carefully. I see that the nature and extent --
9 first of all, that the Defendant has provided substantial
10 assistance in the investigation and prosecution of others
11 and that the nature and extent of that substantial
12 assistance is such as to warrant a downward departure the
13 equivalent of two offense levels. Therefore, the Court
14 will sentence in this matter, with reference to the
15 guidelines, as though the offense level were 21 rather
16 than 23. And therefore, the equivalent guideline range
17 to be applied for reference in this matter is 51 --
18 excuse me, 41 to 51 months.

19 Mr. Abrams, did I calculate that correctly?

20 MR. ABRAMS: You did, Your Honor.

21 THE COURT: Do you agree, Mr. Gast?

22 MR. GAST: Yes, sir, Your Honor.

23 THE COURT: Well, then, Mr. Abrams, tell me what
24 is the appropriate sentence for me to impose in this
25 case.

1 MR. ABRAMS: Your Honor, I filed a sentencing
2 memorandum. And basically --

3 THE COURT: I've read it. As you know, if you
4 submit it, I'll read it. I have read it; you can assume
5 that I have.

6 MR. ABRAMS: I know that indeed. Your Honor, here
7 we have a situation where Ms. Franks has cooperated from
8 the very beginning. She has four children who love her;
9 numerous letters in support of leniency in this
10 particular case. She accepted responsibility and she
11 wants to turn her life around. Letters include the fact
12 that she is going to church and that she wants to be a
13 good role model for her kids. She knows that she needs
14 drug rehab, and she would ask that the Court consider
15 putting her into a program.

16 As the Court can tell, she cares deeply about her
17 kids. She knows that she's made mistakes and she has
18 stated wants to go forward. Her father is here and other
19 people are here on her behalf. This is a woman who is
20 loved and who knows this and who feels grateful in many
21 ways. And she does desire to address the Court. She
22 feels grateful in many ways because this is -- even
23 though it's not a happy thing to get arrested and charged
24 and all the things that she has to go through and to be
25 away from her kids, she knows this is the only way to go

1 forward.

2 She's been incarcerated for eight months at this
3 stage of the game, and I want to bring something to Your
4 Honor that I think needs to be brought up in sentencing
5 hearings. In some ways, I think I've been negligent in
6 not bringing these matters up.

7 THE COURT: Before you move on to that. You've
8 said something that is different from what I understand
9 from the record. You said she's been in custody for
10 eight months?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Okay. Because this referred to her
13 having been taken into custody on December 11th -- okay.
14 So that is eight -- excuse me. That is eight months. I
15 calculated wrong.

16 MR. ABRAMS: If I -- may I?

17 THE COURT: You may continue.

18 MR. ABRAMS: Thank you, Your Honor. I believe
19 under the 3553(a) factors the Court should consider the
20 costs relating to incarceration. And based upon the most
21 recent figures put out that I can determine from -- by
22 the Department of Justice, the amount to keep a federal
23 prisoner incarcerated per year is \$34,135.

24 THE COURT: Let me stop you for a second. Under
25 which of the provisions under 3553(a) do you say that

1 that falls?

2 MR. ABRAMS: All right. I'm going to try to tie
3 this in as well as with *Booker*. Under (d) it says that
4 imposition of the sentence -- and, of course, there are
5 several factors that are listed: to provide the
6 defendant with needed educational and vocational
7 training, medical care or other correctional treatment in
8 the most effective manner. Okay. I'm going to tie this
9 in as best I can. My position is that my client needs
10 drug treatment. That's all that she really needs.

11 Studies have shown that once a person is
12 incarcerated for even three years that they have learned
13 their lesson. I'm going to make a pitch to Your Honor
14 based upon 3553(a) factors, as well as *Booker*, which says
15 that -- it says that, basically, a court should institute
16 a sentence sufficient but not greater than necessary.
17 I think monetary considerations affect every case. If
18 there is no consideration concerning money, funds will
19 not be there to provide drug treatment. Funds will not
20 be there to provide defendants with adequate defense
21 attorneys. Funds will not be there for court personnel
22 to be there.

23 I believe that 3553(a) mandates, as well as
24 *Booker*, that the Court consider all considerations
25 relating to sentencing that is relevant, even if that

1 relevance not only affects one particular defendant but
2 across the broad spectrum of the entire group of
3 defendants, across -- that the Court handles, and even
4 across the country that the court must consider monetary
5 considerations. I think it would be negligent if the
6 Court did not consider what it would cost to incarcerate
7 --

8 THE COURT: Mr. Abrams, if I do that, if I start
9 trying to consider the costs of incarceration as opposed
10 to alternatives, how do I then apply the sentencing
11 guidelines? Those same costs apply in every case. The
12 those average costs are the same, regardless of who the
13 defendant is and what he or she did. Does that just mean
14 that there's -- since the country -- the federal
15 government's now broke, so I have to discount all of the
16 guideline ranges by, is it 10 percent? Is it 20 percent?
17 Is it 50 percent? How do I do this sort of calculus that
18 you want me to do?

19 MR. ABRAMS: This is how I believe the Court
20 should do this calculation. However, whether or not, you
21 know, I can say for sure that this is the way the Court
22 might want to do this type of calculation I cannot say.
23 But I believe that the law mandates considering -- in
24 making all considerations that the Court should look at
25 each particular defendant and what those defendants'

1 needs are, absent more than just -- more than just
2 consideration considering punishment and deterrence.
3 Those are all factors too, but I believe that money and
4 the costs of effectuating what is necessary for each
5 defendant need to be taken into consideration under 3553.

6 I cannot tell you specifically the Court should
7 give this much weight to the factor or that much weight
8 to the factor, but I know that the Court should give some
9 weight to the factor and not discount the factor
10 completely. Because by discounting the factor
11 completely, I believe the Court would not be
12 accomplishing what 3553 stands for, and that is the Court
13 shall impose a sentence sufficient but not greater than
14 necessary to comply with the purposes set forth in
15 paragraph two.

16 I think that monetary -- I believe that with each
17 defendant monetary considerations fall in line with that
18 paragraph, as well as with *Booker*. I do not believe that
19 discounting those factors entirely would be proper. I
20 realize, Your Honor, this is a novel argument. And I'm
21 putting forth this argument in many ways not solely as,
22 you know, in response to the Sequester and what the
23 government is doing, but I believe, in the light of day,
24 a court should and must consider all relevant factors.
25 The Court may consider these factors as tangentially

1 relevant or marginally relevant. They are relevant. And
2 discounting them entirely, I believe, would be improper.

3 THE COURT: Okay. Do you have any other argument
4 as to what is the appropriate sentence for me to impose?

5 MR. ABRAMS: Well I did break it down into
6 monetary considerations, Your Honor. I believe that she
7 needs 33 months of incarceration is our view. It is our
8 position it should go down two addition levels. That is,
9 the 33 months of incarceration will give her enough time
10 incarcerated to go through a drug treatment program and
11 allow her to go back with her kids. The costs to the
12 government, if I may, is \$93,871 based upon an amount of
13 \$2,844.58, not adjusted for inflation, that it would cost
14 to keep her in jail per month, as opposed to, for
15 instance, a 41-month sentence which would cost the
16 government \$116,627.78 and a 51-month sentence which
17 works out to \$145,073.58. And I just want to point out
18 --

19 THE COURT: How did you arrive upon a two level --
20 an additional two level reduction? I mean, did you just
21 pull that out of the air? Do you have a reason for it?

22 MR. ABRAMS: It takes about two years to go
23 through drug -- to get someone into drug rehab, into the
24 classes and get them out once they are put into a federal
25 prison. That's 24 months she's been in there for eight

1 months. I added the two together and added one
2 additional month, and that's where I came up with the 33
3 months.

4 THE COURT: So your argument is that what the
5 Defendant really needs is drug rehab. That it is your
6 estimation that if I sentence her to 33 months that she
7 would receive that treatment as expeditiously as
8 possible, and as soon as she completes it that the
9 sentence would be concluded? That's your calculation?

10 MR. ABRAMS: I would also put in, as I said
11 before, that studies have shown within three years people
12 have learned their lesson. That's right up there with
13 three years. It's not fun being separated from one's
14 children. That's punishment, Your Honor. There's a
15 deterrent effect. But I think that to go further is
16 overreaching, Your Honor. I think it would --

17 THE COURT: Well let me ask you this. How do you
18 square your argument with the Supreme Court case that
19 says I can't fashion the length of a term of
20 incarceration based on what sort of services would be
21 received during that term? In other words, the two are
22 to be considered independent of one another. There, of
23 course, the situation was, as you know, with the 500-hour
24 program, which is a very good drug program. A defendant
25 isn't going to receive the benefit of that unless he or

1 she receives a 60-month sentence. And there the judge
2 imposed a 60-month sentence and said on the record, I'm
3 doing this so that the defendant gets the 500-hour
4 program. The Supreme Court says you can't do that. So
5 how can I link time to rehabilitative services that are
6 provided, which is exactly what you're asking me to do?

7 MR. ABRAMS: Well I would argue it's not exactly
8 what I'm asking you to do, but I'm asking you to consider
9 it. Once again, I believe these are considerations. In
10 some ways these are novel arguments, Your Honor. But I
11 believe that if it cannot be accomplished within that
12 period, then I believe it would be -- the government
13 would be at fault. The purpose of -- the statutory
14 purposes of punishment are basically this, to afford for
15 certain things such as rehabilitation and deterrence,
16 other factors that affect the defendant personally. And
17 this would be a fair sentence -- a sentence that, I
18 believe, would be just under the circumstances, that two
19 points reduction. And I believe that the Court should
20 consider the monetary impact that the additional time is
21 going to cost. Costs relating to other defendants and
22 the court system as a whole and specifically this
23 defendant.

24 THE COURT: Okay.

25 MR. ABRAMS: That's my best argument, Your Honor.

1 THE COURT: Okay. Thank you.

2 Mr. Gast, what's the position of the Government?

3 MR. GAST: Your Honor, please. The Government
4 believes that a guideline sentence is appropriate in this
5 case in consideration of the 5(k) motion that the Court's
6 granted. First, just very briefly, about the financial
7 arguments made by Mr. Abrams. We ask the Court not to
8 consider that, as those are policy arguments and they are
9 not appropriate for this court. Those are great
10 arguments to make to his representative or his senator,
11 but to make them here would be entirely inappropriate.
12 Those are not matters for the Court to consider.
13 What's more, if this Court considered those matters and
14 other courts did not, that would result in unwarranted
15 sentencing disparities which the law clearly directs the
16 Court not to do.

17 If such considerations are to be made then they
18 need to be made across the board, and that means Congress
19 needs to do that. And beyond that, just saying this is
20 how much it costs to incarcerate somebody so let's save
21 that money? Obviously, if we let everyone out, that
22 would save the government a whole lot of money. It just
23 then would have other societal costs. This court is not
24 in the position to weigh those -- to balance those
25 interests. There's no information presented to the Court

1 to allow it to do so. So I ask the Court not to consider
2 that at all.

3 Your Honor, a couple of things about her, in
4 particular, when considering where in the guideline range
5 to sentence her. One is that she is a recidivist. She
6 was previously convicted of possession of marijuana with
7 intent to distribute and another distribution charge. In
8 fact, she was on probation for that offense. And if the
9 Court looks at paragraph 59 and the factual recitation of
10 what occurred during that conviction, some of those
11 transactions also were in front of minor children, and
12 that is very troubling.

13 When we look at the instant case before the Court
14 of numerous transactions that occurred in front of the
15 children, those are set forth just -- this wasn't my
16 case. But just a skimming of the facts shows, at least
17 in four different paragraphs, paragraphs 10, 12, 18 and
18 19 all make reference to -- even if we accept the proffer
19 that she didn't smoke the drugs in front of the children,
20 she either did it in another room or was allowing drug
21 trafficking to go on in the presence of the children.

22 There's evidence in the record of her driving her
23 children out at 11:30 at night to conduct the drug trade.
24 There was paragraph 12 where -- I'm sorry. It was
25 paragraph 10 where, when the undercover and the

1 Confidential Source arrived at her home, she left the
2 home and asked the Confidential Source and the
3 undercover, whom she believed to be drug users, to watch
4 her children for her while she went and got drugs for
5 them. Your Honor, I have pretty strong feelings about
6 people using children in this position and I'll try to
7 limit myself to just the rational arguments about that.
8 I guess what I would say about that is that it's hard for
9 the government to look at the existence of children in
10 this scenario and not look at that as an aggravator,
11 rather than mitigator.

12 Having small children for whom you are responsible
13 is exactly why you do not engage in this conduct. That
14 is exactly why you go to treatment and you get yourself
15 off those drugs. That is exactly why you put their needs
16 before your physical wants and your physical desires.
17 And to be sure, reading these letters from the children,
18 I mean, they're heartbreaking. They're heartbreaking to
19 me as a parent, as well.

20 But you look at that, number one, and it just
21 breaks your heart to even think of the process of asking
22 a child to do that. Here, please write a letter to the
23 Court asking the judge not to put Mommy in jail. I mean,
24 what an awful thing to subject a child to in the first
25 place. Secondly, what child of this age would not write

1 those things when asked to by their parent? We see that
2 all the time, even in child sex abuse cases where the
3 children say nice things about the parents about not
4 wanting them -- that's their world. That's what they
5 understand. I don't pretend to know the dynamics of this
6 home in particular; I'm certainly not in a position to
7 tell the Court whether, you know, the kids genuinely felt
8 this way or didn't feel this way.

9 I'm simply saying that the defendant put those
10 children in an extremely difficult position and even
11 having to author these letters, not to mention the
12 difficult position she put them in of ferrying them
13 around conducting drug trades and having people whom she
14 believed to be drug dealers watch the children while she
15 leaves to go get drugs to give them. So, to say that
16 someone has children and because they have children that
17 should be some kind of mitigator and that should justify
18 giving them a shorter sentence, I don't know what's
19 better.

20 A lot of times we see male defendants who have no
21 contact with their children on a regular basis and yet
22 they come before the Court asking to have that time with
23 their children before they're too old to miss that. At
24 least in that circumstance when they don't have that
25 contact with the children, those typically male

1 defendants who don't have the contact with the children,
2 at least are not subjecting the children to that
3 lifestyle to that environment. Here you have an
4 environment clear from the record where this is going on
5 around them on a regular basis.

6 So I ask the Court not to consider this a
7 mitigator. As much as I want to say it ought to be
8 considered as an aggravator, I'm not even asking the
9 Court to do that. I'm simply saying this is not a basis
10 for which to justify a downward departure. Lots of
11 defendants have children and lots -- not all,
12 unfortunately, but lots of those defendants would prefer
13 to be with those children. Indeed, all of those
14 defendants would prefer to be doing something else rather
15 than being incarcerated but that's not a basis for a
16 downward departure. In fact, looking at the
17 circumstances of this drug conspiracy, this is, if
18 anything, I think the existence of the children around
19 those actions makes this different than the heartland
20 drug conspiracy and makes it worse, not better.

21 The other thing, of course, is that during -- and
22 I mentioned the recidivism earlier. But during the
23 course of this conspiracy she was on supervision. So at
24 each and every one of those transactions, even if we
25 didn't know anything about it, even if the people to whom

1 she were selling weren't an undercover and a confidential
2 source, it could have subjected her to a new arrest for
3 that single transaction and the revocation of supervised
4 release, and it didn't seem to bother her at the time.
5 All that to be said, Your Honor, those kids were in a
6 very bad position and it's because of these defendants.
7 So I ask the Court to sentence within the guideline
8 range, rather than a downward departure.

9 Finally, Your Honor, with respect to this notion
10 that treatment is all she needs. Treatment may be what
11 she needs. But I would submit to the Court, just looking
12 at the record, she was on probation. She was actually
13 getting some drug treatment, according to paragraph 85.
14 Perhaps she needed some better treatment than that. But,
15 really, when you're on probation, that's kind of on her
16 to seek that out. And the fact that she didn't seek that
17 out -- of course, everybody seeks it out once they are
18 facing prison. And, you know, we all hope they take it
19 and it inures to their benefit and frees them from that.
20 But to say that, you know, just because it's a drug case
21 we should sentence them to the very bare minimum or they
22 need to get drug treatment and no more. I, frankly,
23 submit that's ludicrous. And not only is it ludicrous,
24 but it would warrant -- it would result in unwarranted
25 sentencing disparities.

1 In fact, the Court should consider the nature of
2 the quantity and the factors that are set forth in the
3 guidelines, consider the substantial assistance that she
4 did give which has put her a year or so below the
5 mandatory minimum that the statute would require that she
6 receive. So she's done herself good in that respect.
7 But to come before the Court and say it's, you know, do
8 something less for the children. I would submit that
9 looking at the record, if anything, I don't think that
10 that would be to the children's benefit. Thank you.

11 THE COURT: Okay. Thank you.

12 Ms. Franks, at this time you have the opportunity
13 to address the Court and to tell me anything that you
14 feel I should know before I make my decision about your
15 case.

16 THE DEFENDANT: I just want to say I'm sorry. I
17 made mistakes and I screwed up, and I know I hurt my kids
18 the most. I can't change nothing I did. I'll accept
19 whatever I get and I'll make the best of it. But I do
20 love my kids, and I just hope that they and my family can
21 forgive me.

22 THE COURT: Take your time.

23 THE DEFENDANT: I mean, there are some things in
24 the thing that's not true but, you know, I accept the
25 responsibility and what I did do, and I'm sorry. That's

1 all I can say.

2 THE COURT: Okay. Thank you Ms. Franks.

3 Ms. Franks, I need for you to stand for the
4 imposition of sentence. Pursuant to the Sentencing
5 Reform Act of 1984 and the case of *United States versus*
6 *Booker*, it is the judgment of this court, having
7 considered the factors noted in 18 U.S.C., Section
8 3553(a), that the defendant, Kristy Franks, is hereby
9 committed to the custody of the United States Bureau of
10 Prisons to be imprisoned for a term of 41 months.

11 Now with regard to the application of the factors
12 for sentencing under the statute, Section 3553(a), there
13 are several factors that go into the formulation of this
14 sentence. First of all, with regard to the seriousness
15 of the offense. I see a lot of drug cases in this court,
16 and a number of them deal with crack cocaine or cocaine
17 base. It is one of the more dangerous drugs that I see.
18 It does tremendous damage to people's lives.

19 I think that is reflected by the fact that even
20 for the drug quantities that are involved in this case
21 Congress, in its wisdom, has seen fit to require a
22 mandatory minimum sentence of five years in cases like
23 this. Now I haven't imposed five years because there are
24 some different circumstances here, but Congress sees this
25 as an offense that requires a minimum of five years.

1 Until the recent amendments to the statute, Congress saw
2 that this was a quantity that warranted a minimum
3 sentence of ten years in prison. That's how serious the
4 law takes this particular offense. Now, of course,
5 Congress has changed that. I'm aware of the fact that
6 the ten year minimum no longer applies, but I think that
7 reflects the danger of this drug to the people who use
8 it, to the people to whom it is sold, and the cancer that
9 it is on our neighborhoods, on our communities, and on
10 our society as a whole.

11 That being said, in this case, I have imposed a
12 sentence that really is a third off of the mandatory
13 minimum. I have done so because of the cooperation of
14 the defendant. I think that it promotes respect for the
15 law to allow for a reduction in sentence for someone who
16 has been cooperative with the authorities, particularly
17 in the investigation and prosecution of others who are
18 breaking the law and, therefore, I have allowed for a
19 substantial reduction for that. I believe that the
20 41-month sentence, though, is really the minimum to which
21 I can go, notwithstanding defense counsel's arguments
22 because I need -- I believe that that is necessary to
23 afford adequate deterrence to conduct of this nature, not
24 just by this defendant but by others who may contemplate
25 it. In other words, if there is anyone who is

1 considering distributing this quantity of crack cocaine,
2 they need to realize that there are very few
3 circumstances, if any circumstances, that they would
4 receive a sentence less than 41 months for such activity,
5 particularly when it is done while already under
6 supervision at the time that the offense is being
7 committed.

8 I've heard defense counsel's very creative
9 arguments, but I do have to say that the upshot of the
10 defense argument with regard to the financial
11 considerations is that for financial reasons the Court
12 should disregard the advice provided by the guidelines.
13 If I do that and other courts don't, then I have a
14 tremendous disparity in the sentences that are given.
15 Moreover, that's a policy consideration. If the
16 Sentencing Commission thinks that sentences ought to be
17 substantially shorter because prisons are so expensive,
18 then the Sentencing Commission ought to tell us that
19 that's the guidance that they give us. For me to start
20 trying to make up what the Sentencing Commission is
21 trying to tell us through the guidelines because of what
22 it costs, it creates a sort of attempted calculation that
23 nobody can do and that's impossible.

24 Likewise, with the arguments that are set forth in
25 the Defendant's brief: Essentially, that the Defendant

1 has children who need her. I believe that that's very
2 true and that the root of the Defendant's offenses are
3 her addiction. I believe that that's probably true.
4 Unfortunately, that's exactly the same thing that I hear
5 in case after case after case. This case really isn't
6 any different there. It's a terrible commentary under
7 the circumstances but that doesn't make it a case that's
8 outside of the heartland, and I have to find that it's
9 outside of the heartland in order to go outside of the
10 guideline range or to otherwise depart or vary from the
11 guidelines. So, for those reasons, I have imposed the
12 sentence that I have.

13 It is ordered that the Defendant be required to
14 support all dependents from prison earnings while
15 incarcerated, as outlined in the presentence report.

16 The Court calls to the attention of the custodial
17 authorities that the Defendant has a history of mental
18 health issues and recommends that the Defendant be
19 allowed to participate in any available mental health
20 treatment programs during the period of incarceration.

21 The Court also calls to the attention of the
22 custodial authorities that the defendant has a history of
23 substance abuse and recommends that the Defendant be
24 allowed to participate in any available substance abuse
25 treatment programs while incarcerated and, if eligible,

1 to receive the benefit of 18 U.S.C., Section 3621(e)(2).

2 It is further recommended that the Defendant be
3 allowed to participate in any educational and vocational
4 opportunities while incarcerated.

5 Upon release from imprisonment the Defendant shall
6 be placed on supervised release for a term of four years.
7 Within 72 hours of release from the custody of the Bureau
8 of Prisons, the Defendant shall report in person to the
9 probation office in the district to which the Defendant
10 is released. While on supervised release, the Defendant
11 shall not commit another federal, state or local crime
12 and shall comply with the standard conditions that have
13 been adopted by the Court in the Western District of
14 North Carolina.

15 It is further ordered that the Defendant shall pay
16 the United States a special assessment in the amount of
17 \$100.

18 The Court finds that the Defendant does not have
19 the ability to pay a fine or interest. And having
20 considered the factors noted in 18 U.S.C., Section
21 3572(a), the Court will waive the payment of a fine and
22 interest in this case. Payment of the criminal monetary
23 penalties shall be due and payable immediately.

24 The Court has considered the financial and other
25 information contained in the presentence report and finds

1 that the following is feasible. If the Defendant is
2 unable to pay any monetary penalty immediately, during
3 the period of imprisonment, payments shall be made
4 through the Federal Bureau of Prisons Inmate Financial
5 Responsibility Program. Upon release from imprisonment,
6 any remaining balance shall be paid in monthly
7 installments of no less than \$50 to commence within 60
8 days after release until paid in full. Throughout the
9 period of supervision, the probation officer shall
10 monitor the defendant's economic circumstances and shall
11 report to the Court with recommendations, as warranted,
12 any material changes that affect the defendant's ability
13 to pay any court ordered penalties.

14 Mr. Abrams, were there any other issues regarding
15 either the sentence or the judgment that need to be
16 addressed?

17 MR. ABRAMS: No other issues, Your Honor.

18 THE COURT: Any for the government, Mr. Gast?

19 MR. GAST: No, Your Honor.

20 THE COURT: Ms. Franks, you have the right to
21 appeal this sentence to Fourth Circuit Court of Appeals
22 on any grounds you've not previously waived. You've
23 pleaded "guilty" pursuant to a plea agreement. That plea
24 agreement includes some waivers that may substantially
25 affect your appeal rights. You will need to consult with

1 your attorney regarding the effect of those waivers.
2 However, if you choose to appeal, you must file a written
3 notice of appeal with the clerk of this court within a
4 period of 14 calendar days following the date of the
5 entry of the final judgment in this case.

6 If you choose to appeal but do not have the funds
7 with which to appeal, you have previously been determined
8 to be indigent and therefore may appeal at government
9 expense. Do you understand this right of appeal as I
10 have explained it to you?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: In closing, Ms. Franks, I want to make
13 an observation. And that is, in many respects you have
14 an opportunity that relatively few defendants have. And
15 that is that you are young enough and this sentence is
16 short enough that you're going to get another chance.
17 The thing is, if you mess up this chance, there is no way
18 that you're going to get that time back with your
19 children. And the ones who will suffer a hundred times
20 more than you will will be your children. Make sure that
21 from here you turn things around. I am gratified to see
22 that you have the sort of family support that you have,
23 because that bodes well for your ability to do that. But
24 it depends more than anything else on what you do and
25 what you decide to do and what you determine to do, if

1 not for yourself, for your kids. For their sake make
2 sure that you never get messed up with this again. Make
3 sure we never see you back here again. It's not because
4 we don't like to see you, we just don't like to see you
5 like this. Please make sure that happens. We wish you
6 the best in that, Ms. Franks.

7 THE DEFENDANT: Thank you.

8 MR. ABRAMS: Thank you, Your Honor.

9 THE COURT: The Defendant is remanded to the
10 custody of the marshal. This matter is concluded.

11 (Off the record at 2:52 p.m.)
12
13

14 **CERTIFICATE**

15 I, Tracy Rae Dunlap, RMR, CRR, an Official Court
16 Reporter for the United States District Court for the
17 Western District of North Carolina, do hereby certify
18 that I transcribed from audio recording to the best of my
19 ability, by machine shorthand, the proceedings had in the
20 case of UNITED STATES OF AMERICA versus KRISTY FRANKS,
21 Criminal Case 2:12-CR-33(5) on August 21, 2013.

22 In witness whereof, I have hereto subscribed my
23 name, this 29th day of October 2013.
24

25 __/S/__Tracy Rae Dunlap__
TRACY RAE DUNLAP, RMR, CRR
OFFICIAL COURT REPORTER